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Nos. 84-28 and 84-143

In the Supreme Court of the United States

OCTOBER TERM, 1984

DONALD C. BROCKETT, APPELLANT

v.

SPOKANE ARCADES, INC., ET AL.

KENNETH EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL., APPELLANTS

v.

J-R DISTRIBUTORS, INC., ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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In the Supreme Court of the United States

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No. 84-28

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INTEREST OF THE UNITED STATES

This case raises important questions concerning the constitutional limitations on legislation regulating obscenity. The United States has a direct interest in this issue because the federal criminal statutes governing dissemination of obscene materials in in-

terstate commerce and the mails, 18 U.S.C. 1461, 1462 and 1465, are subject to these constitutional limitations. Moreover, the total effort to control obscenity, of which the enforcement of federal statutes is an integral part, is rendered less effective by contrived interpretations of state statutes which fall within guidelines set by this Court.

In *Roth* v. *United States*, 354 U.S. 476 (1957), and *Miller* v. *California*, 413 U.S. 15 (1973), this Court formulated a test setting out the constitutionally permissible scope of both federal and state criminal statutes governing obscenity. One part of the test adopted by this Court requires that, in order to be found obscene, the materials in question must appeal to the "prurient interest" in sex. The court of appeals in this case held that the term "prurient" in the *Roth-Miller* test may not be defined with reference to the word "lust," and that a statute that uses the word "lust" in defining "prurient interest" is facially invalid. If adopted, the lower court's restrictive definition of "prurient interest" would impair the ability of state and federal courts to explain the meaning of the term "prurient" to juries, and it would confine the ability of both Congress and the state legislatures to define the concept of "prurient interest."

The court of appeals invoked the "overbreadth" doctrine to invalidate the Washington state statute before the state courts had an opportunity to apply and construe that law. An expansive application of the "overbreadth" doctrine, such as that employed by the court of appeals in this case, could subject federal as well as state obscenity statutes to facial constitutional challenges whenever a statute departs in any way from the precise language of the constitutional test set forth by this Court. That ap-

proach could interfere with the enactment as well as the enforcement of both federal and state obscenity legislation.

STATEMENT

1. In 1982, the State of Washington enacted an anti-obscenity statute, referred to as House Bill 626 (84-28 J.S. App. 1a-5a). The statute imposes criminal penalties for the sale, exhibition, display, or production of "lewd matter" for profit-making purposes (84-28 J.S. App. 1a, 4a; Wash. Rev. Code Ann. § 9.68.040 (Supp. 1984-1985)).[1] The statute defines "lewd matter" by adopting the constitutional standard governing the regulation of obscene materials set forth by this Court in *Miller* v. *California*, 413 U.S. 15 (1973). The statute provides (84-28 J.S. App. 1a; Wash. Rev. Code Ann. § 7.48A.010(2) (Supp. 1984-1985)):

> (2) "Lewd matter" is synonymous with "obscene matter" and means any matter:
>
> (a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and
>
> (b) Which explicitly depicts or describes patently offensive representations or descriptions of:

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[1] The statute also establishes a system of civil penalties for "moral nuisances," which include places where lewd films are exhibited or possessed for the purpose of exhibition, lewd films, places where lewd publications "constitute a principal part of the stock in trade," and places used "as a regular course of business" for lewdness or prostitution (84-28 J.S. App. 3a; Wash. Rev. Code Ann. § 7.48A.020 (Supp. 1984-1985)). This portion of the statute also was held unconstitutional by the court of appeals, but that aspect of the ruling below is not at issue in this Court.

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

The statute then defines the term "prurient," which is used in the definition of "lewd matter," as follows (84-28 J.S. App. 2a; Wash. Rev. Code Ann. § 7.48A.010(8) (Supp. 1984-1985)):

"Prurient" means that which incites lasciviousness or lust.

2. On April 5, 1982, four days after the effective date of the statute, appellees commenced two actions in the United States District Court for the Eastern District of Washington challenging the facial constitutionality of House Bill 626 (84-28 J.S. App. 51a). On April 13, the district court issued a preliminary injunction barring the State from enforcing the statute. The district court subsequently rejected appellees' challenge on the merits and held that the statute is not unconstitutional on its face (84-28 J.S. App. 6a-45a). Appellees then obtained a stay of the district court judgment, and the United States Court of Appeals for the Ninth Circuit granted their motion to enjoin enforcement of the statute during the pendency of the appeal (84-28 J.S. App. 52a-53a).

3. The court of appeals reversed the district court's judgment by a divided vote (84-28 J.S. App. 47a-98a), holding that House Bill 626 is unconstitutional on its face. The flaw in the statute, according to the court of appeals, is that it includes the word "lust" in its definition of the term "prurient." Judge Wallace dissented from the majority's ruling (see 84-28 J.S. App. 86a-98a).

The court of appeals first stated that it was appropriate to hold House Bill 626 unconstitutional on its face if the statute reached beyond obscene materials and could be applied to any constitutionally-protected speech (84-28 J.S. App. 54a-58a). Where such First Amendment interests are involved, the court held, a statute need not be "substantially overbroad" in order to be challenged successfully as facially unconstitutional (84-28 J.S. App. 57a-58a).

The court also rejected the State's request that the court abstain from reaching the merits of the constitutional dispute until after the Washington state courts had an opportunity to construe House Bill 626 because their construction of the statute might avoid the constitutional issue (84-28 J.S. App. 58a-61a). The court found abstention to be inappropriate because appellees' challenge was based on the First Amendment, and because the court concluded that "several key provisions of House Bill 626 are not susceptible to such saving constructions" (84-28 J.S. App. 61a).

With respect to the merits of the constitutional issue, the court held that because the statutory definition of "prurient" included the term "lust," the statute was inconsistent with the test set forth by this Court in *Miller* v. *California*, *supra*. The court

stated that the term "lust" connotes nothing more than "sexual desire," while the term "prurient" is more restrictive and means only "a shameful or morbid interest in nudity, sex or excretion" (84-28 J.S. App. 69a). The court then concluded that because the statute defines "prurient" by the express use of the term "lust," a limiting construction of the statute would be impossible. The court wrote that "a state court would either have to ignore the statutory definition completely or rewrite the statute in order to narrow its unconstitutional scope" (84-28 J.S. App. 72a).

In dissent, Judge Wallace took sharp issue with the majority's constitutional analysis. He pointed out that in this Court's decision in *Roth* v. *United States*, 354 U.S. 476 (1957), the Court had expressly employed the word "lustful" in defining the term "prurient interest," and that nothing in this Court's subsequent opinions suggested that the word "lust" could no longer permissibly be used in defining "prurience" (84-28 J.S. App. 86a-98a). In addition, Judge Wallace found that, at worst, a limiting construction of the statute "is so obvious that, for prudential reasons, we should at least refuse to decide [appellees'] constitutional challenges on the basis of Washington's mere use of the word 'lust' until a case arises applying the statute" (84-28 J.S. App. 97a).

The appellants noted their appeals to this Court (84-28 J.S. App. 104a-109a; 84-143 J.S. App. E1-E6). On October 1, 1984, this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

The Washington statute's definition of the term "prurient" as "that which incites lasciviousness or lust" plainly is authorized by the decisions of this Court. In *Roth* v. *United States*, 354 U.S. 476, 487 n.20 (1957), this Court used the word "lustful" in defining the term "prurient interest," and in the years since *Roth* the Court has never suggested that "lust" may not be used in defining the concept of prurience. Moreover, modern dictionary definitions of the term "prurient" are entirely consistent with the definition found in the statute. Thus, contrary to the view of the court of appeals, the Washington statute was not rendered facially invalid by the inclusion of the word "lust" in the definition of the term "prurient."

Even if it was in some way improper for the Washington legislature to have used the word "lust" in the statutory definition of "prurient," the use of that word did not render the statute impermissibly overbroad. This Court has held that statutes may not be declared facially invalid on overbreadth grounds unless they are "substantially overbroad." If the Washington statute could in some hypothetical case extend to materials that are not obscene under this Court's decision in *Miller*, the class of materials that would be reached is so small that the statute cannot fairly be deemed "substantially overbroad." The application of overbreadth analysis to a statute such as House Bill 626 is particularly inappropriate in light of the fact that the statute clearly is intended simply to incorporate the constitutional standards set forth in *Miller*. It seems highly unlikely that any person subject to possible prosecution under the statute will be dissuaded from engaging in

protected speech for fear that the statute extends beyond the limits of *Miller*.

Finally, the court of appeals erred in asserting that the definition of "prurient" in the Washington statute was "not susceptible to * * * [a] saving construction[]" (84-28 J.S. App. 61a). While the term "lust," like most of its common synonyms, has varying connotations, the term is most often used to describe something other than a healthy interest in sex. It seems likely that the Washington courts, if given the chance, would construe the term "lust" to refer to an unwholesome interest in sex. If construed in that fashion, the state statute clearly would overcome any constitutional objection. The court of appeals therefore should have stayed its hand to permit the state courts to construe that term in a manner that might well have satisfied even the most exacting constitutional scrutiny.

ARGUMENT

THE DEFINITION OF "PRURIENT INTEREST" IN THE WASHINGTON STATUTE IS NOT UNCONSTITUTIONALLY OVERBROAD

I. The Term "Prurient" Permissibly May Be Defined As "That Which Incites Lasciviousness Or Lust"

In *Miller* v. *California*, *supra*, this Court set forth the constitutional standard for the regulation of obscene materials. In order to be subject to regulation under a valid obscenity statute, the Court held, a work that depicts or describes sexual conduct must (1) "appeal to the prurient interest in sex"; (2) "portray sexual conduct in a patently offensive way"; and (3) lack "serious literary, artistic, political, or scientific value." 413 U.S. at 24.

The Court in *Miller* did not define the term "prurient interest." Instead, the Court gave content to that term by referring to its earlier opinion in *Roth* v. *United States, supra.* In a footnote in *Roth*, the Court discussed at some length the meaning of the term "prurient." The Court first defined material appealing to "prurient interest" as material "having a tendency to excite lustful thoughts." 354 U.S. at 487 n.20. The Court then observed that dictionary definitions of the term "prurient" use words such as "desire or longing," "itching, morbid, or lascivious longings," and "lewd," and that in a prior decision the Court had suggested that "prurient" means the opposite of "wholesome." *Ibid.*, citing *Mutual Film Corp.* v. *Industrial Commission*, 236 U.S. 230, 242 (1915). Finally, the Court noted that the Model Penal Code defined the term "prurient interest" as meaning "a shameful or morbid interest in nudity, sex, or excretion," and stated that it perceived "no significant difference" between the Model Penal Code definition of "prurient interest" and the definitions that had been developed in the caselaw.[2] Thus, the

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[2] In a reference to the prior caselaw on the subject (see 354 U.S. at 489 n.26), the Court cited a number of cases that described the test for obscenity by using the terms "lust" or "lustful." See *Parmelee* v. *United States*, 113 F.2d 729, 736 (D.C. Cir. 1940) (material is protected if "the erotic matter is not introduced to promote lust"); *United States* v. *One Book Called "Ulysses"*, 5 F. Supp. 182, 184 (S.D.N.Y. 1933) (meaning of the word 'obscene" is "[t]ending to stir the sex impulses or to lead to sexually impure and lustful thoughts"); *Commonwealth* v. *Isenstadt*, 318 Mass. 543, 550, 62 N.E.2d 840, 844 (1945) (material is obscene if it has "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire"); *Missouri* v. *Becker*, 364 Mo. 1079, 1085, 272 S.W.2d 283, 286

Roth Court clearly approved "lustful" as one of several possible definitions for the term "prurient interest" in the context of an obscenity prosecution.

The Court confirmed the propriety of using the word "lustful" in defining obscenity by upholding the jury instructions given in the two cases under review in *Roth*. In the first case, the trial court had defined obscene materials by reference to their tendency "to excite lustful thoughts." 354 U.S. at 486. The trial court in the other case had defined obscene materials as those that have a tendency to corrupt "by inciting lascivious thoughts or arousing lustful desires." *Ibid.* This Court found no flaw in either formulation, even though each prominently featured the term "lustful."

Most federal courts have adopted the Model Penal Code definition of "prurient" as "a shameful or morbid interest in * * * sex," relying on the Court's specific approval of that formulation. See, *e.g.*, *Red Bluff Drive-in, Inc.* v. *Vance*, 648 F.2d 1020, 1026 (5th Cir. 1981) ("shameful or morbid interest in sex"), cert. denied, 455 U.S. 913 (1982); *Penthouse International, Ltd.* v. *McAuliffe*, 610 F.2d 1353, 1363-1364 (5th Cir. 1980) ("shameful or morbid, rather than a healthy, interest"); *United States* v. *Hamling*, 481 F.2d 307, 321 (9th Cir. 1973), aff'd, 418 U.S. 87 (1974) ("shameful or morbid interest in sex"); *Haldeman* v. *United States*, 340 F.2d 59, 62 n.5 (10th Cir. 1965) ("shameful or morbid interest

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(1954) (materials are obscene if they "incite lascivious thoughts, arouse lustful desire"); *Adams Theatre Co.* v. *Keenan*, 12 N.J. 267, 272, 96 A.2d 519, 521 (1953) (citation omitted) (Brennan, J.) (question is whether "dominant note of the presentation is erotic allurement 'tending to excite lustful and lecherous desire' ").

in sex"); 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 62.06 (3d ed. 1977) ("the principal appeal * * * must be to a morbid interest in sex, as distinguished from a candid interest in sex"). Other courts, however, have pointed to the reference to the word "lustful" in the *Roth* opinion, and have defined "prurient interest" in terms of "lust." See, *e.g.*, *United States* v. *35 MM. Motion Picture Film*, 432 F.2d 705, 711 (2d Cir. 1970) ("lustful" connotes "a sense of debasement, of subnormal furtiveness or guilt"); *Childs* v. *Oregon*, 431 F.2d 272, 275 (9th Cir. 1970) (defining "prurient interest" in terms of "lascivious thoughts" and "lustful desires" is not impermissible in light of *Roth*); *Flying Eagle Publications, Inc.* v. *United States*, 273 F.2d 799, 803 (1st Cir. 1960) (material appealing to prurient interest is "material having a tendency to excite lustful thoughts"); *Universal Film Exchanges, Inc.* v. *City of Chicago*, 288 F. Supp. 286, 294 n.5 (N.D. Ill. 1968) (same); *Big Table, Inc.* v. *Schroeder*, 186 F. Supp. 254, 259 (N.D. Ill. 1960) (same).

By referring to several different definitions of the term "prurient," and by approving the instructions given in the cases under review in *Roth*, this Court made it clear that the legal meaning of "prurient interest" is not restricted to the exact language of the Model Penal Code. Any similiar formulation of the concept of "prurience" plainly is acceptable, as long as it connotes an unhealthy or unwholesome interest in sex. Indeed, in a case decided shortly after *Roth*, the First Circuit made just that point. In *Flying Eagle Publications, Inc.* v. *United States*, 273 F.2d 799 (1st Cir. 1960), the court noted the various terms that the *Roth* Court had used in defining "pru-

rient interest," and concluded that these terms—including the term "lustful"—were meant to suggest "material which excites an unwholesome or unhealthy interest in sex." 273 F.2d at 803.

The court of appeals also concluded that even if *Roth* and *Miller* authorized the use of "lust" to define "prurient interest," that definition is no longer permissible because the contemporary usage of "lust" connotes only "sexual desire" (84-28 J.S. App. 67a). The court of appeals erred by ignoring the well-established legal meaning of "lust" and basing its decision on its view of the contemporary meaning of that term. This Court in *Miller* v. *California*, *supra*, indicated that it is the judicial meaning of terms, not their common usage, that is relevant for the purposes of constitutional analysis. 413 U.S. at 18 n.2. Cf. *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).

Moreover, the court of appeals' assumption regarding the contemporary usage of "lust" is incorrect. Modern dictionary definitions of "prurient" are consistent with both the *Roth* definition and the definition in the Washington statute. The leading dictionaries define "prurient" by using words such as "lustful," "lascivious," "lewd," and "lecherous." See *Webster's Third New International Dictionary of the English Language* 1829 (1981); *Webster's New World Dictionary of the American Language* 1145 (college ed. 1972); *American Heritage Dictionary of the English Language* 1054 (college ed. 1976); *Black's Law Dictionary* 1104 (5th ed. 1979). Indeed, one of the most respected modern American dictionaries defines "prurient" as "causing lasciviousness or lust" —almost exactly the same definition that is used in the Washington statute. See *Random House Dictionary of the English Language* 1158 (1966).

The words "lust" and "lustful" are similarly defined by reference to terms such as "lecherous," "lascivious," and "libidinous." See *Webster's Third New International Dictionary of the English Language*, *supra*, at 1348. Other related terms, such as "salacious" and "lewd," are in turn defined by reference to the word "lustful." See *Webster's Third New International Dictionary of the English Language*, *supra*, at 1301, 2002; *Webster's New World Dictionary of the American Language*, *supra*, at 842, 1285; *American Heritage Dictionary of the English Language*, *supra*, at 752, 1144. Each of these related terms carries a slightly different connotation, but the core meaning is the same: an excessive, illicit, unhealthy, or unwholesome interest in sex. The meaning of the word "lust" therefore is not restricted to simple "sexual desire" as the court of appeals concluded in this case, and the Washington statute's use of "lust" to define "prurient" is consistent with the modern understanding of those terms.

It is especially clear that the word "lust," as used in the Washington statute, is meant to carry the connotation of unwholesomeness, because "lust" is used in the statute in conjunction with the word "lasciviousness." See *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Accordingly, when read in context, the Washington statute's definition of "prurient" as "that which incites lasciviousness or lust" plainly suggests the arousal of an unwholesome sexual desire. That definition conforms both to the legal concept of "prurient interest" that this Court discussed in *Roth* and to the common understanding of the term "prurient" in modern parlance. The State's use of the term "lust"—and its failure

to adhere strictly to the Model Penal Code definition of "prurient interest"—therefore provides no basis for declaring the Washington obscenity statute void on its face.

II. The Washington Statute Is Not Invalid Under The "Overbreadth" Doctrine

Even if the Court were to conclude that the definition of the term "prurient" in the Washington statute potentially may be flawed in some respect, the judgment of the court of appeals nonetheless should be reversed, because that court erred by declaring the statute facially void.

1. The court of appeals ruled that parties challenging a statute on First Amendment grounds may obtain an immediate federal court resolution of the merits of their claims simply by asserting that the law is overbroad. By adopting that approach, the court of appeals misapplied the "overbreadth" doctrine fashioned by this Court in *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), and its progeny.

The traditional rule is that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York* v. *Ferber*, 458 U.S. 747, 767 (1982) (collecting cases). The First Amendment overbreadth doctrine is a limited exception to this rule. It permits a party whose actions are not immune from punishment under a properly-drafted law to challenge the constitutionality of a "sweeping statute, or one incapable of limitation" (*New York* v. *Ferber*, 458 U.S. at 772), on the ground that the statute's breadth impermissibly "chills" the exercise of protected speech

by third parties not before the court. See *City Council* v. *Taxpayers for Vincent*, No. 82-975 (May 15, 1984), slip op. 8-10; *New York* v. *Ferber*, 458 U.S. at 768-769 (collecting cases). Since it is " 'difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application,' " (*New York* v. *Ferber*, *id.* at 772 n.27 (citation omitted)), the Court has limited the doctrine to those instances in which the statute is substantially overbroad, *i.e.*, when the statute is unconstitutional "in a substantial portion of the cases to which it applies" (*Regan* v. *Time, Inc.*, No. 82-729 (July 3, 1984), slip op. 8 (plurality opinion)), and there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court" (*City Council* v. *Taxpayers for Vincent*, slip op. 9-10; see also *New York* v. *Ferber*, 458 U.S. at 770; *Broadrick* v. *Oklahoma*, 413 U.S. at 615).

The court of appeals in this case held (84-28 J.S. App. 57a-58a) that this limiting principle does not apply when the challenged statute regulates speech rather than conduct. This Court expressly rejected that contention in *New York* v. *Ferber*, *supra*. In that case, the New York Court of Appeals had concluded that the substantiality requirement enunciated in *Broadrick* v. *Oklahoma*, *supra*, did not apply to a challenge to a state law prohibiting the distribution of material depicting the sexual performance of children under 16 "because the challenged statute, in its view, was directed at 'pure speech.' " 458 U.S. at 766.

This Court rejected the state court's distinction between "speech" and "conduct," on the ground that such a distinction failed to reflect "the purpose and

nature of the [overbreadth] doctrine." 458 U.S. at 772. The Court explained that the degree to which an overbroad statute chills the exercise of protected activity turns on the scope of the statute, not on the activity it affects. The Court therefore found "no appreciable difference" between the effect that an allegedly overbroad statute would have upon a bookseller deciding whether to distribute a particular magazine and its effect upon a state employee deciding whether to participate in a political campaign. *Ibid.* In fact, the Court noted that the bookseller's economic incentive to distribute the publication might well lessen, if not offset, any deterrent effect caused by the statute. *Ibid.*

When analyzed under the principles set forth in *Broadrick* v. *Oklahoma*, *supra*, and *New York* v. *Ferber*, *supra*, it is clear that the Washington statute is not substantially overbroad. The court of appeals erred by seizing upon the term "lust" and assessing the chilling effect of the statute by reference to that term alone, instead of examining the relationship between that term and the reach of the statute. The Washington statute incorporates all three elements of the *Miller* test for obscenity, and the definition of "prurient interest" therefore does not by itself prescribe the scope of the Act. Even if the term "lust" had the broad definition postulated by the court of appeals, the statute would reach only material "[w]hich explicitly depicts * * * patently offensive representations or descriptions" of specific sexual conduct (84-28 J.S. App. 1a) and "[w]hich, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value" (*ibid.*).

Under these circumstances, the Washington statute is not nearly so expansive as the court of appeals believed. The court of appeals found great significance in the difference between its view of "lust" as mean-

ing arousal of sexual desire, and what it viewed as the proper definition of "prurient"—inciting a "shameful or morbid interest in * * * sex" (84-28 J.S. App. 69a). Yet any materials satisfying the two unchallenged elements of the statutory test—patently offensive representations of specific sexual conduct which lack literary, artistic, political, or scientific value—would be unlikely to arouse a healthy "sexual desire," instead of a "shameful or morbid interest in sex." The allegedly overbroad definition of "prurient" thus would result in only a marginal expansion of the scope of the statute, and could have only a very small deterrent effect on protected speech (see *New York* v. *Ferber*, 458 U.S. at 772). Therefore, the statute cannot be deemed "substantially overbroad."

Application of the "overbreadth" doctrine in this case is particularly inappropriate for two additional reasons. First, obscenity regulation has been so thoroughly scrutinized under the First Amendment that statutes and ordinances governing obscene materials normally are drawn along the now-familiar lines of the three-part *Miller* test. Many statutes, like the Washington statute, even track the exact language used by the Court in *Miller* (see, *e.g.*, *Red Bluff Drive-In, Inc.* v. *Vance*, 648 F.2d at 1026). Because the Washington legislature obviously attempted to incorporate into House Bill 626 the constitutional standards for obscenity set forth in *Miller* v. *California*, *supra*, it hardly seems likely that the definition of "prurient" was designed to undermine the limitations of the *Miller* test and to extend state regulation beyond the boundaries set by this Court.[8]

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[8] The Washington Supreme Court's interpretation of a predecessor statute as adopting the *Miller* test (*State* v. *J-R Distributors, Inc.*, 82 Wash. 2d 584, 512 P.2d 1049 (1973), cert. denied, 418 U.S. 949 (1974)) bolsters this conclusion.

Second, because the substantive law governing the regulation of obscenity has been shaped largely by judicial decisions, particularly the decisions of this Court, the federal and state statutes regulating this subject have in effect been supplemented by a substantial body of caselaw. The plain text of the statutes no longer provides a complete answer to any question that may arise as to their scope, or their constitutionality. Hence, a statute that allegedly departs from the prevailing judicial test for obscenity is not likely to deter conduct or speech because it is limited by the detailed constitutional guidelines established by this Court.

2. Even if the court of appeals were correct in its view that a broad construction of the term "lust" would have a significant chilling effect on protected First Amendment activity, the court still should have stayed its hand to await a definitive construction of that term by the Washington state courts. This Court has long recognized that proper regard for the respective roles of federal and state tribunals in resolving constitutional attacks on state statutes requires that substantial weight be given to the costs of premature and avoidable federal interference with the enforcement of state laws. See, *e.g.*, *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). The values served by abstention are especially important where, as here, the statute under attack is designed to implement the State's historic and powerful interest in "the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself" (*Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 58 (1973)), and where, as here, federal intervention threatens to nullify a comprehensive regulatory

scheme that the state courts have had no opportunity to construe (*Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 306-312 (1979)).

It is no answer to say, as did the court of appeals, that abstention is inappropriate because House Bill 626 unequivocally uses the word "lust," and that "lust" is not subject to a narrow construction that would render it constitutionally unobjectionable. This Court has cautioned against "assum[ing] that the [state] courts will widen the possibly invalid reach of the statute by giving an expansive construction" to a challenged provision. *New York* v. *Ferber*, 458 U.S. at 773; see also *Regan* v. *Time, Inc.*, slip op. 9-10 & n.8 (plurality opinion). That principle applies with special force in a case such as this one, where the state courts have expressed their willingness to construe state obscenity laws in accordance with this Court's decision in *Miller* (see *State* v. *J-R Distributors, Inc.*, 82 Wash. 2d 584, 512 P.2d 1049 (1973), cert. denied, 418 U.S. 949 (1974)).[4]

In sum, if this Court were to conclude that the contemporary definition of the term "lust" could potentially render the Washington statute overbroad, this case would plainly be among those "that call most insistently for abstention" (*Harris County*

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[4] Given the host of alternative and constitutionally unchallengeable constructions of the term "lust," a federal court would not assume that Congress intended to adopt an unconstitutional definition of that term. See *United States* v. *12 200-Ft Reels of Super 8MM. Film*, 413 U.S. 123, 130 n.7 (1973). See also *Regan* v. *Time, Inc.*, slip op. 8-10 (plurality opinion); *New York* v. *Ferber*, 458 U.S. at 769 n.24. It therefore ill behooves a federal court to assume, without any support in the state legislative record, that a state court would rule that the state legislature intended to embrace a constitutionally questionable definition.

Comm'rs Court v. *Moore*, 420 U.S. 77, 84 (1975)). Since the Washington state legislature obviously sought to conform House Bill 626 to the requirements set forth in this Court's decision in *Miller*, the State's own courts should be given the opportunity to resolve any doubts concerning the scope of the statute. For a federal court to rush to invalidate the State's legislative efforts in this setting is to invite the kind of "needless friction" between the federal courts and the States that the abstention doctrine was designed to avoid. *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. at 500. Because that harm could easily be avoided simply by awaiting a definitive construction of the statute from the state courts, abstention clearly would be the proper course.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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